President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

February 7, 2023

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 86

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4), all-volunteer, non-partisan, non-profit organization dedicated to the preservation and advancement of gun owners' rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of the District of Columbia and the Bar of Maryland. I recently retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland Firearms Law, federal firearms law and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home, muzzle loading, as well as a range safety officer. I appear today in OPPOSITION to SB 86.

The Bill: SB 86 amends MD Code, Public Safety, § 5-134 to provide that "A PERSON WHO IS UNDER THE AGE OF 21 YEARS MAY NOT POSSESS A RIFLE OR SHOTGUN." The Bill provides exceptions for this ban, stating such possession is permitted if the person is "UNDER THE SUPERVISION OF ANOTHER WHO IS AT LEAST 21 YEARS OLD … AND ACTING WITH THE PERMISSION OF THE PARENT OR LEGAL GUARDIAN." Such possession is likewise permitted if the person is 1. PARTICIPATING IN MARKSMANSHIP TRAINING OF A RECOGNIZED ORGANIZATION; AND 2. UNDER THE SUPERVISION OF A QUALIFIED INSTRUCTOR. And possession is permitted if such possession is required by the person for employment and for self-defense against "A TRESPASSER INTO THE RESIDENCE." A violation of this ban on possession is punishable by imprisonment for 5 years and $10,000 fine.

The Bill Is Flatly Unconstitutional. Stated simply, 18–20-year-olds have Second Amendment rights under *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), and *District of Columbia v. Heller*, 554 U.S. 570 (2008), as applied to the States under the 14th Amendment in *McDonald v. Chicago*, 561 U.S. 742 (2010). As stated in *Bruen*, "[i]n *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. *Bruen*, 142 S.Ct. at 2125. This right extends to all "law-abiding, responsible citizens." *Bruen*, 142 S.Ct. at 2131. The issue posed by this Bill is thus whether 18-20-year-olds fall within this broad category of "law-abiding responsible citizens" such that a flat ban on all firearm possession is unconstitutional. That question virtually answers itself.

The *Bruen* Court ruled that "the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 142 S.Ct. at 2127. The relevant time period for that historical analogue is 1791, when the Bill of Rights was adopted. 142 S.Ct. at 2135. That is because "'Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.'" Id., quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–635 (2008). Under that standard articulated in *Bruen*, "the government may not simply posit that the regulation promotes an important interest." 142 S.Ct. at 2126. Likewise, *Bruen* expressly rejected deference "to the determinations of legislatures." Id. at 2131. Bruen also abrogates the two-step, "means-end," "interest balancing" test that the courts had previously used to sustain gun bans. 142 S.Ct. at 2126. Those prior decisions are no longer good law. So, the constitutionality of SB 1, and SB 118 will turn on this historical analysis, as there is no doubt that the term "keep and bear arms" in the text of the Second Amendment necessarily includes the right to possess ("keep") and the right to carry ("bear").

There can be no doubt that possession falls within the text of the right to "keep and bear Arms." So, the question of whether 18-20-year-olds have such a right of possession is answered by the historical inquiry test set out in *Bruen*. In *Firearms Policy Coalition, Inc. v. McCraw*, --- F.Supp. ---, 2022 WL 3656996 (Aug. 25, 2022), a federal district court struck down, under *Bruen*, a Texas ban on carry of a handgun by 18–20-year-olds. The court focused on the prefatory clause of the Second Amendment, holding that the clause was intended to preclude any elimination of the militia and thus "must protect at least the pool of individuals from whom the militia would be drawn" in 1791. Id. The court found that in 1791, "the Militia comprised all males physically capable of acting in concert for the common defense," noting that "at the time of the founding, most states had similar laws requiring militia service for 18-to-20-year-olds." Id. at *6. The court ruled that "the plain text of the Second Amendment, as informed by Founding-Era history and tradition, covers the proposed course of conduct and permits law-abiding 18-to-20-year-olds to carry a handgun for self-defense outside the home." Id. Adhering to *Bruen*'s admonition that the burden falls on the State in such circumstances, the Court found that Texas "failed to carry its burden" and, therefore, "the law must be enjoined." Id. at 8. Texas initially appealed but has since elected to dismiss its appeal. See *Andrews v. McCraw*, No. 22-10898, Dkt #34 (5th Cir. Dec. 21, 2022) (granting motion to dismiss appeal).

A very similar analysis was employed in *Hirschfeld v. BATF*, 5 F.4th 407, 417 (4th Cir.), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021), *cert. denied*, 142 S.Ct. 1447 (2022), the Fourth Circuit (which includes Maryland) applied intermediate scrutiny and held, pre-*Bruen*, that the federal ban on the sale of handguns to persons between the ages of 18-20, 18 U.S.C. § 922(b)(1), was unconstitutional under the Second Amendment and could not be justified, even under intermediate scrutiny. While the decision issued prior to *Bruen*, the approach followed by the court

remains sound. As noted, *Bruen* abrogated the two-step, means-ends, intermediate scrutiny, holding it was "one step too many." *Bruen*, 142 S.Ct. at 2127. However, in so holding, the Court also noted that the "first step" of that means-end inquiry was "broadly consistent with *Heller*" in that it demanded an inquiry "rooted in the Second Amendment's text, as informed by history." Id.

The *Hirschfeld* court conducted exactly that "first step" analysis in holding that "18-to-20-year-olds are protected by the Second Amendment." 5 F.4th at 418. In so holding, *Hirschfeld* consulted the same "text, structure, history, and practice" considered by the court in *McCraw*, stating that "[w]hen evaluating the original understanding of the Second Amendment, 1791—the year of ratification—is 'the critical year for determining the amendment's historical meaning.'" Id. at 419, quoting *Moore v. Madigan,* 702 F.3d 933, 935 (7th Cir. 2012) (citing *McDonald*, 561 U.S. at 765 & n.14). In particular, the court focused on the traditions dating back to the Founding era militia laws, which, the court ruled, "illuminate the broader individual right enshrined in the Second Amendment." 5 F.4th at 424. As the court explained "[e]very militia law near the time of ratification required 18-year-olds to be part of the militia and bring their own arms." Id. at 428.[1] See generally, David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults,* 43 Southern Illinois University Law Journal 495 (2019). The logic of these decisions is irrefutable. Indeed, Tennessee has just consented to the entry of judgment in federal district court overturning its ban on carry by 18-20-year-olds. That consent was filed in *Beeler v. Long*, No. 3:21-cv-152 (E.D. Tenn. 2023).

The holdings in *Hirschfeld* and *McCraw* are obviously applicable, *a fortiori*, to any ban on mere possession of a long gun, which is far more draconian, both in the item covered (long guns vs. handguns) and the restriction imposed (a possession ban, not merely a ban on sales or carry). By any measure a total ban on mere **possession** is the most severe and the least justifiable infringement on the Second Amendment right to keep and bear arms. That was certainly true prior to *Bruen* when courts selected which tier of scrutiny by reference to the severity of the burden imposed on the Second Amendment right. See, e.g., *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013); *NRA v. BATF*, 700 F.3d 185, 198 (5th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011).

Under *Bruen*, such severe restrictions are impossible to justify under the text, history and tradition test that *Bruen* makes applicable to Second Amendment challenges. There is simply no well-established, representative historical analogue that could possibly justify a total ban on possession of long guns by 18-20-year-olds. After all, the typical weapon that an 18-year-old would bring to militia training in 1791 would have been a long gun that he already owned. Nor is there any **modern**

[1] While the decision in *Hirschfeld* was vacated as moot when the plaintiffs no longer fell within the 18-20-year-old range, such decisions are still entitled to persuasive effect. See, e.g., *Russman v. Board of Educ. of Enlarged City School Dist. of City of Watervliet*, 260 F.3d 114, 121 n.2 (2d Cir. 2001). For example, *Hirschfeld* was given precisely such persuasive effect in *McCraw*. 2022 WL 3656996 at *10 & n.3.

tradition of banning mere possession by persons in this age group. As *Hirschfeld* noted "Congress was careful not to burden use, possession, or non-commercial sales" of handguns. 5 F.4th at 460. Federal law has long permitted the sale to and possession of long guns by 18-year-olds, as 18 U.S.C. § 922(b)(1), just as Maryland law has permitted it. MD Code, Public Safety, § 5-205.

The Bill Is Extreme: *No State* has ever adopted a total ban on mere possession of long guns by all 18-20-year-olds, not even New York, New Jersey or California, jurisdictions at the pinnacle of gun-control. As in other States, eighteen is the age of majority in Maryland and an eighteen-year-old is thus treated as "an adult for all purposes and has the same legal capacity, rights, powers, privileges, duties, liabilities, and responsibilities that an individual at least 21 years old had before July 1, 1973." MD Code, General Provisions, § 1-401(a)(2). Such persons may freely enlist in the military and be sent to fight (and possibly die in combat) for their country. Such persons may already have purchased and/or legally possess long guns. This Bill would thus require dispossession of such firearms. Enforcement will likely be arbitrary or discriminatory.

Similarly, Maryland hunting licenses are freely available to persons within this age group after obtaining a hunter safety certificate and such persons are free to hunt without supervision. This Bill would effectively ban hunting by 18-20-year-olds. Indeed, *persons under the age of 18* with a hunter safety certificate from DNR may also hunt independently with firearms. That is because existing Maryland law, MD Code, Criminal Law, § 4-104, expressly provides that firearms may be accessed by persons under the age of 16 if they possess a hunter safety certificate issued under MD Code, Natural Resources, § 10-301.1. Such hunter safety certificates are not age limited. Indeed, Section 10-301.1(f)(1) expressly provides that DNR "may issue a 1-year gratis hunting license to a Maryland resident **under the age of 16 years** who has successfully completed a hunter safety course."

Section 4-104 also provides that a minor may accorded access to a firearm if such access is supervised by a person who is "at least 18 years old." That provision would be rendered nonsensical by this Bill. Effectively, this Bill would ban hunting with long guns by 18- to 20-year-olds, but not ban hunting by persons under the age of 18 by anyone who has a hunter safety certificate. This Bill contains no exceptions for 18–20-year-olds possessing such a certificate. That result is irrational. The alternative is, of course, to ban possession of all long guns by all persons under 21. That would effectively kill all youth hunting in Maryland, the very activity that DNR seeks to encourage. https://bit.ly/3DgR4zO.

Persons between the ages of 18 and 20 may also be completely emancipated from his or her parents and living on their own. Yet, this Bill would require an 18-20-year-old to get the permission of, and possess a long gun only if supervised by, a parent or a "guardian." The Bill ignores that the parental duty to supervise and provide maintenance ends at the age of majority (age 18), as do guardianships. MD Code, Family Law, § 5-328. The only other item of commerce for which possession by persons 18-20 years of age is banned is alcohol. MD Code, Criminal Law, § 10-114. But as any parent with college-aged children knows, the ban on underage

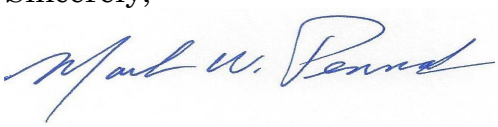
possession of alcohol is seldom enforced and enforcement, when it does happen, **must** be done via a **civil citation**, MD Code, Criminal Law, § 10-119(a)(1)(i), (f), not by imprisonment for up to 5 years and a $10,000 fine, the punishment imposed by this Bill for mere possession of a long gun that an individual may already own and possess. See *in re Albert S.*, 106 Md.App. 376, 664 A.2d 476 (1995) (holding that arrest of juvenile for possessing an alcoholic beverage was unlawful).

The 5-year imprisonment and $10,000 fine imposed by this Bill for mere possession by otherwise **law-abiding** 18–20-year-olds is also bizarre because it is substantially **more severe** than the 3-year term of imprisonment that may be imposed for the possession of long guns by **a disqualified person** under the very Maryland law that this Bill amends. See MD Code, Public Safety, § 5-205(d). That result is irrational. The Bill contains no *mens rea* requirement, thus does not require that the illegal possession of a long gun by the otherwise non-disqualified person be knowingly or willfully. The Bill imposes strict criminal liability on such persons, a result that is highly disfavored in the law and utterly unjustifiable in these circumstances where such possession has always been legal under federal and Maryland law and under the law of every other State. See *Lawrence v. State*, 475 Md. 384, 257 A.3d 588, 603-04 (2021) (discussing Supreme Court precedent). This Bill would simply trap the unwary and will undoubtedly be enforced arbitrarily. The personal firearms of new residents 18-20 years of age, including military personnel newly stationed in the State, would now be illegal in Maryland.

The penalty imposed by this Bill would also impose a lifetime firearms disability under both federal and State law. See MD Code, Public Safety, § 5-101(g) (defining disqualifying crime), 18 U.S.C. § 922(g), 18 U.S.C. § 921(a)(20) (providing that any conviction of any State misdemeanor punishable by more than two years is disqualifying). We understand that people differ with respect to firearms. However, a hatred for all things firearms related cannot justify creating a whole new class of criminals in Maryland for simple possession of long guns where such possession has long been permitted under federal law and in every State in the Union.

The Bill is extreme and obviously has not been thought out. It should be withdrawn. If not withdrawn, the Committee should issue an unfavorable report.

Sincerely,



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